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No. 99-1760

Supreme Court, U.S.
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In the Supreme Court of the United States

SMITHFIELD FOODS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States may bring a civil enforcement action under the Clean Water Act against petitioners for violations of a National Pollutant Discharge Elimination System (NPDES) permit that contains both federally mandated and state mandated effluent limitations.

2. Whether Section 309(g)(6)(A) of the Clean Water Act, which provides that a person shall not be subject to a judicial action for civil penalties if a State has prosecuted an administrative penalty action under State law that is "comparable" to federal law (33 U.S.C. 1319(g)(6)(A)), precludes the government's civil penalty suit in this case.

3. Whether petitioners received fair notice of their obligation under the Clean Water Act to comply with the effluent limitations in their NPDES permit.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 191 F.2d 516. The opinion of the district court granting the United States' motion for partial summary judgment on liability (Pet. App. 63a-113a) is reported at 965 F. Supp. 769. The opinion of the district court assessing a penalty (Pet. App. 29a-62a) is reported at 972 F. Supp. 338.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1999. A petition for rehearing was denied on January 6, 2000 (Pet. App. 114a-115a). On March 27, 2000, the Chief Justice extended the time for filing a petition for certiorari to and including May 5, 2000, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this civil action against petitioners to enforce provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, which petitioners had frequently violated from 1991 to 1997. The Clean Water Act generally prohibits any pollutant discharges into waters of the United States except in compliance with the Act's permitting scheme. Petitioners obtained a Clean Water Act permit, but repeatedly discharged wastewater containing illegal levels of fecal coliform, phosphorus, and other pollutants into the Pagan River, a tributary of the James River, in violation of the permit conditions. In addition, during the same period, petitioners submitted false reports and destroyed documents to hide their unlawful discharges from state and federal agencies. The district court rejected petitioners' various arguments in defense of their permit violations, and the court assessed a civil penalty of $12.6 million. The court of appeals affirmed the finding of liability but remanded the case for a minor adjustment in the amount of the penalty.

1. The Clean Water Act is a comprehensive statute, administered primarily by the Environmental Protection Agency (EPA), that seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). The Act's central mechanism for meeting that objective is Section 301(a), which prohibits the discharge of pollutants into the waters of the United States by any person except as authorized by specified sections of the Act. 33 U.S.C. 1311(a).

Section 402 of the Act provides one of the primary means for obtaining authorization to discharge pollutants. Section 402 establishes a permitting program known as the National Pollutant Discharge Elimination System (NPDES). Under the NPDES permitting program, persons (including commercial and industrial facilities) may obtain a permit allowing pollutant discharges in accordance with prescribed conditions, including effluent limitations, and monitoring and reporting requirements. See 33 U.S.C. 1311, 1318, 1342; see generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987). EPA has primary responsibility for administering the NPDES permit program, but Section 402(b) provides that a State can establish and administer its own NPDES program if the state program conforms to federal guidelines and receives EPA's approval. Nevertheless, Section 402 requires EPA to exercise continuing oversight of EPA-approved permitting programs. See 33 U.S.C. 1342(c)-(d). For example, a State may not issue a permit if EPA objects. If the State refuses to issue a permit acceptable to EPA, EPA may issue an appropriate permit. See 33 U.S.C. 1342(d).

Section 309 of the Clean Water Act, 33 U.S.C. 1319, provides a variety of means for the United States and the States to enforce provisions of the Act, including provisions authorizing EPA to commence a civil enforcement action in court, 33 U.S.C. 1319(b), or to initiate administrative penalty proceedings, 33 U.S.C. 1319(g). EPA's enforcement authority is not limited to EPA-issued permits. EPA may enforce any conditions of state-issued NPDES permits that implement the relevant provisions of the Clean Water Act. 33 U.S.C. 1319(a)(1) and (3), (b), (d), and (g)(1)(A). See *Gwaltney*, 484 U.S. at 53 ("The holder of a state NPDES permit is

subject to both federal and state enforcement action for failure to comply."); see also 33 U.S.C. 1342(i) (providing that federal enforcement is not limited by the existence of a state permitting program).

Section 309(b) specifically authorizes the United States to seek injunctive relief, 33 U.S.C. 1319(b), while Section 309(d) additionally authorizes the courts to impose civil penalties of up to $25,000 per day for each violation, 33 U.S.C. 1319(d).[1] Section 309(g) authorizes EPA to assess administrative penalties in substantially smaller amounts. 33 U.S.C. 1319(g). Section 309(g)(4) provides extensive and detailed procedures for public participation in the administrative penalty assessment process, including a right of public notice and comment, the right of any interested persons to petition for a hearing, and the right of interested persons to present evidence if a hearing is held. 33 U.S.C. 1319(g)(4).

Section 309(g)(6) of the Clean Water Act addresses the issue of whether the prosecution of a federal or state administrative penalty action should preclude a judicial enforcement action. See 33 U.S.C. 1319(g)(6). Section 309(g)(6)(A) provides that, if EPA or a State has commenced and is diligently prosecuting, or has successfully completed, an administrative penalty action under subsection (g) or a comparable state law, the violations at issue shall not be the subject of a citizen suit or a civil penalty action under Section 309(d). 33 U.S.C. 1319(g)(6)(A).

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[1] For violations occurring after January 30, 1997, the maximum penalty is $27,500 per day. 40 C.F.R. 19.4 (implementing Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 note (Supp. IV 1998) (Pub. L. No. 104-134), and Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note (Pub. L. No. 101-410).

2. Petitioners operate neighboring pork processing and packing plants in Smithfield, Virginia. The two plants generate wastewater containing animal blood, hair, viscera, excrement, flesh, bone, soil particles, and cleaning materials. The wastewater is high in organic pollutants, including fecal coliform, ammonia, nitrogen, and phosphorus. Pet. App. 38a-42a, 45a; PX 2.

Until 1997, petitioners discharged their wastewater into the Pagan River, a tributary of the James River, pursuant to an NPDES permit issued by the Commonwealth of Virginia in 1986, modified in 1990, and reissued in 1992. The 1992 permit contained monthly average and/or daily maximum effluent limitations on numerous pollutants. The permit also imposed monitoring, reporting, and record-keeping requirements. Pet. App. 64a-67a, 72a-73a.

In 1987, Virginia entered into the historic Chesapeake Bay Agreement with EPA, Pennsylvania, Maryland, and the District of Columbia. See 33 U.S.C. 1267 (establishing Chesapeake Bay Program Office within EPA). Under that Agreement, Virginia committed to reduce by 40% the amount of nitrogen and phosphorus entering the Chesapeake Bay. To fulfill its obligations under the Agreement, Virginia promulgated a Policy for Nutrient Enriched Waters, which required that NPDES permits for facilities discharging into nutrient-enriched waters (of which the Pagan River is one) be modified to include phosphorus limits. See 9 Va. Admin. Code §§ 25-40-10 *et seq.* (2000); *id.* § 25-260-350(18). Petitioners sued Virginia, alleging that the phosphorus limitation was not technologically achievable. Pet. App. 67a. Virginia nevertheless modified petitioners' permit in 1990 to impose discharge and monitoring requirements on phosphorus and nitrogen. Petitioners appealed the permit and threatened to

move their plants and their 3,000 jobs out of Virginia. *Id.* at 67a; PXs 7, 8.

Beginning in 1990, petitioners and the Virginia State Water Control Board (Board), which administers Virginia's NPDES permit program, entered into a series of agreements, termed "Special Orders," requiring petitioners to study the costs and feasibility of connecting their wastewater system to the Hampton Roads Sanitation District (HRSD), rather than discharging directly to the Pagan River. Pet. App. 3a-8a, 66a-69a. After petitioners' consultant found that connecting to HRSD was the most cost-effective method for petitioners to meet their current and future pollution control obligations, petitioners elected to connect to HRSD. PX 21, § 6. The Board and petitioners entered into a Special Order (the May 1991 Order) stating that if petitioners elected to connect to HRSD, they were to do so within three months of notification that a sewer line was available to collect their wastewater. Pet. App. 69a. The order expressly provided that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in" petitioners' NPDES permit. *Id.* at 70a.

Because petitioners' permit was due to expire in 1991, the Board prepared a draft permit and submitted it for EPA review and public comment. The draft permit required petitioners, among other things, to come into compliance with the 2 mg/l phosphorus limitation by January 4, 1993, and to comply with effluent limits on ammonia, carbonaceous biological oxygen demand (CBOD), and cyanide by May 13, 1994. EPA reviewed and approved the draft permit. Pet. App. 70a, 72a-73a. Petitioners commented on the draft permit, claiming that they could not comply with the draft permit's deadlines for compliance with effluent limits on

phosphorus, CBOD, ammonia, and cyanide, and noting that "[r]elief from such compliance is not specifically present or is not apparent in the [May 1991] Consent Order." *Id.* at 71a. In response, an engineer at a regional office of the Board wrote to petitioners that "[a]ny special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence" over the Permit. *Id.* at 72a. That letter also stated that "[t]he compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations." *Ibid.*

On January 3, 1992, the Board issued petitioners' NPDES permit. Despite petitioners' comments, the permit still contained effluent limitations on phosphorus, CBOD, ammonia, and cyanide. Petitioners did not appeal the 1992 permit, nor have they ever sought to modify those requirements to which they had objected. Pet. App. 72a-74a.

3. Petitioners proceeded to violate every single effluent limitation in their permit. They violated those limitations thousands of times and often by extreme margins. Pet. App. 34a. For example, petitioners' violations of the fecal coliform limits averaged 1,365% of the permitted level. For ammonia, the violations averaged 97% above the limit; for cyanide, the exceedences averaged 168% above the limit. Petitioner's phosphorus exceedences were, on average, 1055% above the limit. *Id.* at 38a. The district court characterized petitioners' violations as "frequent and severe." *Id.* at 39a.

Petitioners also committed serious violations of the reporting and recordkeeping requirements of its permit. Petitioners admitted to submitting false monitoring reports on 15 occasions, Pet. App. 30a, and acknowl-

edged filing reports late, for a total of 164 days of violation, *id.* at 36a. Petitioners were also out of compliance with the record-keeping requirements of their NPDES permit for 884 days because a Smithfield employee, witnessed by two other employees, illegally destroyed petitioners' pre-1994 required documentation. *Id.* at 34a-35a, 55a-56a.

4. The United States filed this enforcement action against petitioners on December 16, 1996, seeking injunctive relief and civil penalties. The United States moved for summary judgment on liability. The United States pointed out that petitioners' monitoring reports established that they had violated their NPDES permit numerous times. In response, petitioners argued that they were not in violation of the permit's phosphorus limitations because the permit was "conditioned, revised, or superseded" by the Board's May 1991 Order. Pet. App. 95a. The district court rejected that argument.

The district court pointed out that the May 1991 Order explicitly stated that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in" petitioners' permit. Pet. App. 95a. The court also noted that petitioners' argument was inconsistent with the Board's express inclusion of phosphorus limitations in the 1992 permit. "The Board's Special Orders or letters dated *before* the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA." *Id.* at 96a. The court carefully reviewed the events leading up to the issuance of the 1992 permit, *id.* at 96a-100a, and it concluded that "the Board's Special Orders did not change the terms of the 1992 Permit, nor did the 1992 Permit implicitly incorporate

any agreements set forth in the Special Orders," *id.* at 100a.

The district court next rejected (Pet. App. 103a-112a) petitioners' claim that the Board's series of administrative orders, permitting petitioners to choose their method of compliance with the phosphorus limitation, amounted to an administrative penalty proceeding under state laws that are "comparable" to Section 309(g) of the Clean Water Act and precluded EPA from enforcing the phosphorus limitation. See 33 U.S.C. 1319(g)(6)(A)(ii). The court noted that, at the time of the Board's actions, Virginia law permitted imposition of administrative penalties only with the consent of the violator (Pet. App. 104a-106a) and that the state law's provisions for public notice and participation did not permit the public to request a hearing or to be present if one was held, or to seek judicial review of the result (*id.* at 106a-111a). Therefore, the court held, the state law under which the Board acted was insufficiently "comparable" to Section 309(g), see 33 U.S.C. 1319(g)(6)(A)(ii), to bar the federal government's civil enforcement action. Pet. App. 104a-112a.

Finally, the district court rejected (Pet. App. 112a-113a) petitioners' argument that Section 510 of the Clean Water Act, which allows States to impose discharge limitations that are more stringent than federal law would require, see 33 U.S.C. 1370, prevents federal enforcement of the phosphorus limitations in petitioners' NPDES permit. The court explained that "the plain language of Section 309(a)(1) and (3) * * * clearly provides that the United States may enforce the phosphorus standard in [petitioners'] Permit" and that Section 510 accordingly "does not preclude the United States from pursuing their phosphorus-based claims

against [petitioners] in this action." Pet. App. 112a-113a.

The district court accordingly granted partial summary judgment for the United States on the effluent limitation violations. Pet. App. 113a. The court later granted partial summary judgment for the United States on two additional counts relating to filing false reports and destruction of documents. *Id.* at 29a-30a, 34a-35a. After a bench trial on penalty issues, the court found petitioners liable for 6,982 days of violation, *id.* at 36a, and it assessed a penalty of $12.6 million, *id.* at 62a.

5. The court of appeals affirmed the finding of liability in a unanimous opinion, but remanded the case for recalculation of the civil penalty. Pet. App. 1a-28a. The court of appeals endorsed and adopted the district court's reasoning on liability. *Id.* at 11a-16a. The court of appeals specifically "concur[red] with the district court that (1) the Board's Orders were not incorporated into nor changed the terms of the 1992 Permit; (2) Virginia's enforcement scheme is not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent penalty action; and (3) neither the Supreme Court's ruling in *Gwaltney*, nor § 510 of the [Clean Water Act] preclude the EPA from bringing this enforcement action." *Id.* at 15a-16a (footnote omitted). The court of appeals extensively discussed petitioners' numerous challenges to the civil penalty assessment and rejected all of the claims but one. *Id.* at 16a-28a. The court of appeals remanded the case to the district court to correct a calculation error that would reduce the penalty by an amount of less than $200,000. *Id.* at 25a-26a. The court, without dissent, denied petitioners' request for rehearing and rehearing en banc. *Id.* at 114a-115a.

ARGUMENT

Contrary to petitioners' characterization (see Pet. 3-4), this case simply involves egregious conduct rather than momentous legal issues. Petitioners committed "frequent and severe" violations of their NPDES permit. Pet. App. 39a. The district court, in a comprehensive opinion, rejected petitioners' justifications for their numerous and extreme violations, a unanimous court of appeals panel affirmed, and, in response to petitioners' request for en banc review, no member of the court of appeals requested a poll. The court of appeals' decision is correct, it does not conflict with the decisions of this Court or any other court of appeals, and it does not present any issue of broad public importance requiring this Court's resolution. Further review is not warranted.

1. The Clean Water Act authorizes EPA to enforce effluent limitations in NPDES permits, including effluent limitations contained in state-issued NPDES permits that are derived from state law. See 33 U.S.C. 1311(a)-(b), 1319(a)(1) and (3).[2] Petitioners nevertheless

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[2] The Clean Water Act unambiguously expresses that principle. Section 301, entitled "Effluent limitations," states: "Except as in compliance with this section and [six other enumerated sections of the Clean Water Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). Section 301(b) then sets a timetable for achievement of federal technology-based effluent limitations and additionally provides that: "In order to carry out the objective of this chapter there shall be achieved * * * any more stringent limitation * * * established pursuant to any State law or regulations." 33 U.S.C. 1311(b) and (b)(1)(C). Section 309 provides that the EPA may bring an enforcement action against "any person [that] is in violation of [Section 301 or other enumerated sections of the Clean Water Act] or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under [Section 402] of this title by [EPA] or by a

argue that the plain language of the Act, authorizing EPA to enforce state-imposed effluent limitations, should yield to a proposition they derive from this Court's decision in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). Petitioners contend that "Congress * * * gave the States primary authority to enforce the limits in the permits they issue" (Pet. 12) and that this Court's decision in *Gwaltney* "made clear that a penalty action brought under the [Clean Water Act] should not be permitted to undermine the efforts of the primary regulatory authority" (Pet. 13). Petitioners' reliance on *Gwaltney* is misplaced.

The Court held in *Gwaltney* that Section 505 of the Clean Water Act, 33 U.S.C. 1365, which authorizes private citizens to bring civil enforcement actions against any person "alleged to be in violation" of the Act, does not apply to wholly past violations. See 484 U.S. at 56-59. The Court concluded that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. The Court determined, from the language and structure of the citizen suit provisions as a whole, that "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.* at 59-60. It hypothesized a situation in which citizens

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State." 33 U.S.C. 1319(a)(3). EPA's statutory authority is accordingly quite clear. Indeed, petitioners conceded in their opening brief in the court of appeals that Section 309(a) "give[s] EPA the general authority to enforce permits, including, *inter alia*, permits containing more stringent standards under state law." Appellant C.A. Br. 37-38. They made the same concession to the district court. See Pet. App. 112a-113a.

brought suit to obtain civil penalties for wholly past violations that EPA had abated through a compliance order in which the government did not seek civil penalties in exchange for the violator's agreement to "take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 61. The Court concluded that the citizen's action in such circumstances would curtail EPA's ability to enforce the Act and "could undermine the supplementary role envisioned for the citizen suit." *Id.* at 60.

Petitioners assert, based on those remarks, that *Gwaltney*'s reasoning should preclude *the United States* from seeking civil penalties for past violations of a state-issued NPDES permit that imposes more stringent conditions than EPA might require. Pet. 13-14. Petitioners overlook that the Clean Water Act expressly authorizes the United States to take such action, see p. 11 & note 2, *supra*. The *Gwaltney* decision—which discussed the relationship between governmental and citizen enforcement—does not address the relationship between federal and state enforcement. Sections 301 and 309 expressly address *that* issue, they recognize that the federal government can enforce state-issued NPDES permits, and they authorize the United States to bring an enforcement action in this case. See Pet. App. 14a-16a.[3]

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[3] Even if *Gwaltney* had a bearing of the relationship between federal and state enforcement, the factual situations presented in the *Gwaltney* hypothetical and the case presented here are plainly distinguishable. This case is *not* one in which petitioners were pressured by the threat of penalties to choose a more expensive treatment method than they would otherwise have chosen out of economic self-interest. The record is quite clear that Virginia allowed petitioners to choose their method of compliance, and they

Petitioners also argue that Section 510 of the Clean Water Act, 33 U.S.C. 1370, effectively grants the States the exclusive authority to enforce more stringent state law standards. Pet. 14-15. As the district court explained, however, petitioners' interpretation is "completely unsupported by the language of Section 510 and flatly inconsistent with the language, intent, and structure of Sections 309(a) and 301 of the Clean Water Act." Pet. App. 112a.

Section 510 states that "[e]xcept as expressly provided in this chapter," the Clean Water Act does not "preclude or deny the right of any State * * * to adopt or enforce" its own more stringent effluent limits. 33 U.S.C. 1370. Sections 301(b)(1)(C) and 309(a) expressly provide that EPA may enforce effluent limitations in NPDES permits that are based on more stringent state standards. See pp. 3-4, 9-10, 11 & note 2, *supra*. Therefore, even if petitioners were correct in characterizing the federal government's enforcement action in this case as curtailing Virginia's discretion not to enforce the state standards, the Clean Water Act has "expressly provided" for the federal government to take that action. The United States' action in this case accordingly does not contravene Section 510. See Pet. App. 14a-16a, 112a-113a.[4]

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chose to connect to HRSD for reasons of cost-effectiveness and future flexibility. See Pet. App. 3a-8a.

[4] Petitioners err in arguing (Pet. 16) that the court of appeals' decision here is in tension with the Eighth Circuit's decision in *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (1999). *Harmon* involved a federal enforcement action under a different statute, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.* RCRA provides for shared federal-state responsibilities, but its text differs from that of the Clean Water Act in several respects. For example, RCRA provides that a state

2. Petitioners next argue that the Board's issuance of a series of Special Orders directing petitioners to choose a method of compliance with the phosphorus limitation constitutes an administrative penalty action, diligently prosecuted under comparable state law, that bars the United States from bringing this federal enforcement action. Pet. 17-24. Petitioners base that argument on Section 309(g)(6)(A)(ii) of the Clean Water Act, which provides that no civil penalty action may be brought for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to" Section 309(g), which prescribes the Clean Water Act's mechanism for EPA to assess administrative penalties. See 33 U.S.C. 1319(g)(6)(A). The courts below correctly rejected that argument. See Pet. App. 13a-14a, 15a-16a, 103a-112a.

The district court carefully examined the Virginia laws in effect at the time that the Board issued its orders, and it concluded that the state laws under which the Board acted were not sufficiently comparable to the Clean Water Act to trigger Section 309(g)(6)(A)'s limit-

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hazardous waste program operates "in lieu of" a federal hazardous waste program and that authorized state actions have the "same force and effect" as actions by EPA. 42 U.S.C. 6926(b) and (d). The Eighth Circuit decided in *Harmon* that those RCRA provisions precluded EPA from taking a RCRA enforcement action under the facts of that case. 191 F.3d at 898. The United States believes that *Harmon* was wrongly decided. Regardless of its merits, however, *Harmon* is irrelevant to this case because the Clean Water Act contains different and additional language expressly stating that state NPDES programs under the Clean Water Act do *not* preempt federal enforcement. See 33 U.S.C. 1342(i) (providing that "[n]othing in this section [relating to state NPDES programs] shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 ["Enforcement"] of this title").

ation. Pet. App. 111a-112a. As the district court pointed out, Section 309(g) authorizes the Administrator of the EPA to assess nonconsensual penalties of up to $10,000 per day, 33 U.S.C. 1319(g)(2), and allows both the violator and other "interested persons" to request and participate in a hearing or seek judicial review of the administrative penalty, 33 U.S.C. 1319(g)(8). By contrast, the Board in this case acted under Virginia laws that gave the Board no authority to impose administrative penalties on a violator without the violator's consent, Va. Code Ann. § 62.1-44.15(8d) (Michie 1998), and that did not allow anyone other than the violator to request a hearing or to seek judicial review of administrative penalty actions. See Pet. App. 13a-16a, 104a-112a.

Given those fundamental differences, the courts below correctly found that Virginia's law was not "comparable" to Section 309(g) of the Clean Water Act, and therefore held that federal enforcement was not precluded under Section 309(g)(6)(A)(ii). See Pet. App. 13a-14a, 104a-111a. Contrary to petitioners' suggestion, the court of appeals did not "effectively embrace[]" the requirement that "state law must 'mimic' federal law" in order to preclude enforcement of the CWA. Pet. 19. The court of appeals' decision neither states nor implies such a requirement. The court of appeals simply agreed with the district court's sound conclusion that "Virginia's entire enforcement scheme is not comparable to Section 309(g)" for two quite fundamental reasons: The Virginia scheme "does not provide authority to issue administrative penalties," and "it failed, at the time of the Special Orders, to provide adequate procedures for public participation." Pet. App. 111a.

Petitioners are also mistaken in contending (Pet. 19-23) that the court of appeals' application of Section

309(g)(6)(A)(ii) conflicts with decisions of the First and Eighth Circuits. In each of the cases petitioners cite, the state programs at issue differed in fundamental ways from Virginia's program. For example, the First Circuit concluded in *North & South Rivers Watershed Ass'n* v. *Town of Scituate*, 949 F.2d 552, 554 (1991), that a Massachusetts law providing for nonconsensual assessment of administrative penalties and providing for public participation in the penalty assessment process "closely parallels" the Clean Water Act's administrative penalty program. See Mass. Gen. Laws ch. 21A, § 16 (1996). Similarly, the Eighth Circuit concluded in *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376, 381 (1994), cert. denied, 513 U.S. 1147 (1995), that an Arkansas statute authorizing administrative penalties of up to $10,000 per day, which was supported by regulations allowing public participation, was comparable to the Clean Water Act's administrative penalty program. See Ark. Code Ann. § 8-4-103(c) (Michie 2000).

The court of appeals and the district court in this case reached a different result than did the First and Eighth Circuits because the Virginia laws at issue here differed in fundamental ways from the Massachusetts and Arkansas laws there at issue. See Pet. App. 104a-109a. Virginia has now revised its laws to expand its administrative penalty authority, to increase public participation in the penalty assessment process, and to make its administrative processes more comparable to those of EPA and other States. See *id.* at 13a nn.2-3. There is accordingly no warrant for this Court to review the "comparability" of Virginia laws that have been substantially revised, that do not reflect Virginia's current

administrative process, and that have no continuing importance beyond the outcome of this particular case.[5]

3. Petitioners also broadly contend that the court of appeals' decision conflicts with the decisions of other courts of appeals "on the notice required before a party may be penalized for violating regulatory standards." Pet. 24-28. No such conflict exists. The Fourth Circuit, like other courts of appeals, acknowledges that "[d]ue process requires that a party must receive fair notice before being deprived of property." *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 224 (1997), cert. denied, 524 U.S. 952 (1998). The courts below properly rejected petitioners' fact-specific claim that they did not receive fair notice of their obligation to comply with their NPDES permit. Pet. App. 15a, 87a-102a.

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[5] Petitioners suggest (Pet. 23-24) that a conflict has developed between the First and Ninth Circuits on the question of whether preclusion under Section 309(g)(6)(A) arises only from a diligently-prosecuted administrative *penalty* action, or whether any administrative compliance actions will suffice if the State has, but does not use, administrative penalty authority comparable to that provided under Section 309(g) of the Clean Water Act. Compare *Citizens for a Better Environment* v. *Union Oil Co. (UNOCAL)*, 83 F.3d 1111, 1118 (9th Cir. 1996) (holding that the "plainest reading of the statutory language" is that only administrative penalty actions preclude civil penalty actions under Section 309(g)), cert. denied, 519 U.S. 1101 (1997), with *Scituate*, 949 F.2d at 556 (holding, on policy grounds, that "[t]he state's decision not to utilize penalty provisions does not alter the comparability of the State Act's statutory scheme to the scheme found in the Federal Act"). The court of appeals in this case did not address that issue in light of its holding that "Virginia's enforcement scheme is not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent penalty action." Pet. App. 15a-16a. Hence, this case provides no occasion to resolve any conflict that may exist between the First and Ninth Circuit decisions on which petitioners rely.

Petitioners' permit imposed a phosphorus limitation on petitioners with unmistakable clarity. The permit directed petitioners to achieve compliance with the total phosphorus limitations in Part I.C.1 of the permit in accordance with the schedule contained therein. Pet. App. 72a-73a. The permit specifically directed petitioners to:

> (1) "[s]ubmit quarterly progress reports for achievement of final effluent limitations" for phosphorus "[w]ithin 30 days of the effective date of the permit and each calendar quarter thereafter until completion of item #2 below" and
>
> (2) "[a]chieve compliance with final effluent limitations" for phosphorus "[b]y January 4, 1993."

Ibid. Petitioners thus cannot plausibly claim that they lacked fair notice that their permit contained a limit on phosphorus discharges. With equal clarity, the Clean Water Act provides that any person who violates "any permit condition or limitation" implementing, *inter alia*, more stringent state requirements, shall be subject to a civil penalty. 33 U.S.C. 1319(d). See p. 11 note 2, *supra*. Petitioners were therefore on notice that failure to comply with the terms of their NPDES permit could subject them to a federal civil enforcement action and civil penalties.

Petitioners claim that "[t]he Board and [petitioners] agreed to a plan that relieved [petitioners] from meeting that state [phosphorus] limit," thus giving petitioners "every reason to believe" that they were excused from compliance with the phosphorus effluent limitation in their NPDES permit. Pet. 25. Petitioners cannot reasonably claim, however, that their correspondence with the Board relieved them of their obligation

to comply with their NPDES permit. As the courts below comprehensively and correctly explained, neither the correspondence between petitioners and the Board nor the Board's Special Orders modified petitioners' permit or excused petitioners from the legal duty to comply with their permit. See Pet. App. 12a, 15a, 66a-75a, 87a-101a. "The Board's Special Orders or letters dated *before* the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA." *Id.* at 96a. If petitioners wished to be excused from the unambiguous terms of the 1992 permit after its issuance, then they should have applied for a modification of the permit terms. See *id.* at 12a, 95a-96a.

The Clean Water Act and its implementing regulations set forth detailed procedures governing modification of a permit, which are applicable to all approved state NPDES permitting programs. See 33 U.S.C. 1342(a) and (b)(1)(C); 40 C.F.R. 122.62, 123.25, 124.5(c)(1), 124.6(e). Petitioners not only had fair notice of their permit obligations; they did not take advantage of the Clean Water Act's prescribed course for seeking modification of those obligations. See Pet. App. 95a-96a.[6] Moreover, petitioners' claim that they lacked notice rests on the specific facts of this case. That

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[6] The Act's procedures for modification of a permit are not mere technicalities; they are essential to the preservation of EPA's oversight role and the public's right to participate in the permitting process. See 33 U.S.C. 1342(a)(5) and (b)(3); *UNOCAL*, 83 F.3d at 1120 (holding that a state order could not modify the permit because it did not comply with the regulations governing the modification of NPDES permits; noting that compliance with procedures is necessary to "ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities").

claim, which has been carefully reviewed and properly rejected by the district court and a unanimous court of appeals, presents no legal issue of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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